

AUG 6 1979

MICHAEL RODAK, JR., CLERK

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**In The**  
**SUPREME COURT OF THE UNITED STATES**  
**October Term, 1979**  
**No. 79-38**

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**LEOLA PERRY, Administratrix of  
the Estate of James Herschel Perry,**

**Appellant,**

**v**

**KALAMAZOO STATE HOSPITAL,**

**Appellee.**

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**ON APPEAL FROM THE SUPREME COURT OF THE  
STATE OF MICHIGAN**

**MOTION TO DISMISS**

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MOTION TO DISMISS

Appellee, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves that this appeal be dismissed for the reason that it does not present a substantial federal question and that the federal question sought to be reviewed was neither timely nor properly raised, nor expressly passed upon.

STATEMENT OF THE CASE

This is a direct appeal from the final judgment rendered by the Michigan Supreme Court in *Perry v Kalamazoo State Hospital*, 404 Mich 205, 273 NW2d 421 (1978) rehearing denied, 406 Mich 1118, .... NW2d .... (1979) affirming the dismissal of Appellant's state court tort action against a state mental hospital.

As set forth in the opinion of the Michigan Supreme Court, 404 Mich at 209-210, the facts of this case are as follows:

"James Herschel Perry was a resident of Kalamazoo State Hospital on November 14, 1972. On that day, a hospital attendant, in the course of performing his routine duties, found it necessary to restrain Mr. Perry. In so doing, the attendant rendered Mr. Perry unconscious. The attendant then laid Mr. Perry on his back which caused the aspiration of his stomach contents and resulted in his death.

"Plaintiff, administratrix of the estate of James Herschel Perry, filed a complaint in the Court of Claims alleging that defendant breached its duty to provide for the care, treatment and custody of Mr. Perry.

"Defendant moved for summary judgment on the basis that it was immune from liability under the governmental immunity statute, MCL 691.1407; MSA 3.996(107).

"Following argument, the trial court granted defendant's motion for summary judgment. The Court of Appeals affirmed in a memorandum opinion.

"We granted leave to appeal. 399 Mich 894 (1977). We affirm." (Footnote omitted).

## ARGUMENT

### I.

#### THE FEDERAL QUESTIONS SOUGHT TO BE REVIEWED WERE NEITHER TIMELY NOR PROPERLY RAISED NOR EXPRESSLY PASSED UPON BY THE MICHIGAN SUPREME COURT.

In its jurisdictional statement filed in this Court, Appellant asserts the existence of two federal questions: (1) Whether Michigan's statute providing for immunity from tort liability (with certain exceptions not relevant here) for all government agencies engaged in the exercise and discharge of a governmental function deprives Appellant of the allegedly fundamental personal right to seek health care and (2) Whether the immunity statute deprives Appellant of equal protection of the laws. Assuming, *arguendo*, that these allegations raise federal questions, Appellee submits that they were not timely or properly raised, or expressly passed on in the state court proceedings and therefore pursuant to Rule 16(b) of the Rules of the Supreme Court of the United States the appeal should be dismissed.

The statute conferring appellate jurisdiction upon this Court to review final judgments or decrees rendered by the highest court of a state requires that there be "drawn in question the validity of a statute of any state on the ground of its being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of its validity." 28 USC § 1257(2). As is self-evident from the "Amended Complaint" filed in the state trial court (Appellant's App 8a-9a) Appellant did not draw in question the validity of Michigan's governmental immunity statute. Furthermore, despite the statement on page nine of Appellant's jurisdictional statement

filed in this Court that the constitutional question was raised in the brief in the Michigan Supreme Court, the record of the state court proceedings amply demonstrates that the federal question was, in fact, not timely or properly raised. The "Statement of Questions Involved" which appears in Appellant's brief filed in the Michigan Supreme Court lists the two issues as follows, *Perry v Kalamazoo State Hospital, supra*, docket no. 59129, Appellant's Brief and Appendix page v:

"1. Whether the operation of the Kalamazoo State Hospital is a governmental function within the meaning of MCLA 691.1407.

"• • •

"2. Whether MCLA 691.1047 is violative of the constitution of the State of Michigan by reason of depriving Appellant of the equal protection of the laws."

Appellant's disingenuous statement on page nine of its jurisdictional statement that the Michigan Supreme Court "declined" to pass upon the federal question is explained by the simple fact that no federal question was presented to that court.

Appellant's failure, in the state court, to draw in question the validity of Michigan's governmental immunity statute on the ground of its being repugnant to the constitution of the United States deprives this Court of appellate jurisdiction to review the judgment of the Michigan Supreme Court, 28 USC § 1257(2), and, in addition, this Court has uniformly held that it is without jurisdiction unless the federal question was presented for decision to the state courts. *Live Oak Water Users Association v Railroad Commission of California*, 269 US 354 (1926); *Lynch v New York ex rel Pierson*, 293

US 52 (1934). In *Lynch* this Court held that a claim of jurisdiction cannot be sustained by references to briefs and statements which are not part of the record and went on to note, 293 US at 54:

"It is essential to the jurisdiction of this court in reviewing a decision of a court of a state that it must appear affirmatively from the record, not only that federal question was presented for decision to the highest court of the state having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it."

In the instant case, no federal question was presented by Appellant's complaint in the state trial court and no federal question was timely or properly raised or expressly passed on in the Michigan Supreme Court. Thus, this appeal should be dismissed.

# **THIS APPEAL DOES NOT PRESENT ANY SUBSTANTIAL FEDERAL QUESTION.**

The opinion of the Michigan Supreme Court from which this appeal is taken held only that the operation of a State mental hospital constitutes the exercise or discharge of a "governmental function" as that term is defined in the Michigan statute conferring immunity from tort liability upon governmental agencies. In asserting the existence of a federal question in this Court, Appellant posits the existence of a constitutional right to seek health care at state-operated hospitals and goes on to assert that the opinion interpreting the governmental immunity statute "potentially affects" the choice of health care, thus resulting in a deprivation of con-



stitutional rights. The dearth of authority in Appellant's jurisdictional statement is not surprising when it is realized that no case has ever acknowledged the existence of any such constitutional right and when it is further realized that Appellant's argument is based upon the wholly unfounded assumption that the availability of any such health care services is affected by the existence *vel non* of the right to bring a lawsuit for tort liability against the health care provider. Appellant's assertion of a substantial federal question, therefore, is based upon an entirely novel and unsupported theory of an alleged constitutional right to health care and upon the assumption—totally lacking in factual support—that the availability of this constitutional right is totally dependent upon the tort liability of government agencies.

Appellee submits that upon the record of this case there is neither factual nor legal support for Appellant's position and that this question is not so substantial as to require plenary consideration, with briefs on the merits and oral argument for its resolution. Rule 15.1(e), Rules of the Supreme Court of the United States.

In its jurisdictional statement, Appellant has also asserted that the Michigan statute providing immunity from tort liability for government agencies engaged in the exercise or discharge of a governmental function somehow deprives her of equal protection of the laws, but this argument, too, is without merit. The Michigan governmental immunity statute reflects a legislative determination that the ongoing operation of state government requires that government agencies enjoy a certain amount of immunity from tort liability for actions undertaken in the exercise or discharge of governmental functions. Because no suspect classification or fundamental right is involved here, the statute must be upheld "if any state of facts reasonably may be conceived to justify it." *McGowan v Maryland*, 366 US 420 (1961). In MCLA

691.1407 the Michigan legislature provided that governmental agencies are immune from tort liability while engaged in the exercise and discharge of governmental functions. Certain exceptions were statutorily created (liability for injuries caused by defective highways, MCLA 691.1402; liability caused by negligent operation of government-owned vehicles, MCLA 691.1405; liability for injuries caused by dangerous condition of government buildings, MCLA 691.1406) but in conferring a general grant of immunity from tort liability the legislature rationally concluded that such immunity was necessary in order to conserve state resources and to insure that state agencies and officials would be able to execute their official duties without fear of reprisal by way of suits for money damages. The legislative determination that governmental efficiency and effectiveness are enhanced by providing immunity from tort liability is a rational one, and although it might be subject to criticism as a matter of social policy, that legislative determination is clearly a legitimate exercise of the Michigan legislature's constitutional power and does not result in a deprivation of Appellant's right to equal protection of the laws.

**CONCLUSION**

For the reasons stated herein, this appeal should be dismissed.

Respectfully submitted,

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